Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

October Term, 1976

No. 76-~~76~~-293

GRADY TAYLOR, Petitioner

V.

STATE OF TENNESSEE, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

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ON WRIT OF CERTIORARI FROM THE COURT OF CRIMINAL APPEALS OF TENNESSEE

OPINIONS BELOW

The Opinion of the Court of Criminal Appeals of Tennessee was rendered on March 1, 1976, and is not reported. A copy of the Opinion is attached as Appendix "A'. A timely Petition for Certiorari to the Supreme Court of Tennessee was filed and the Supreme Court of Tennessee denied certiorari in a per curiam opinion on June 1, 1976. A Motion for Stay of Execution of the Judgment was filed and Grady Taylor was granted such stay pending the filing and disposition of a Petition for Writ of Certiorari. A copy of the Order of the Tennessee Court of Criminal Appeals is attached as Appendix "B".

JURISDICTION

The judgment of the Court of Criminal Appeals was rendered on March 1, 1976, and a timely Petition for Writ of Certiorari to the Tennessee Supreme Court was filed. The Petition for Certiorari to the Supreme Court of Tennessee was denied on June 1, 1976. This Petition for Certiorari is filed within nnety (90) days of the date of the Opnion of the Tennessee Supreme Court denying certiorari. Jurisdiction is invoked under 28 U.S.C. S1257 (3).

QUESTIONS PRESENTED

1. Whether the Tennessee statute (T. C. A. 39-3013) defining the crime of distribution or exhibition of obscene material is unconstitutional because the statute omits any requirement of knowledge by the defendant for distribution or exhibition within the State of Tennessee.

2. Whether the Tennessee statute providing a civil remedy to enjoin and prohibit future exhibition of obscene material must be construed to permit a criminal charge only for an exhibition or distribution subsequent to the beginning of the civil suit requesting an injunction prohibiting exhibition.

3. Whether the injunction proceeding requiring a defendant to produce a motion picture or other material is part of the criminal scheme and, in reality, a search warrant so that there is an illegal search and seizure in that the statute is unconstitutional and void in violation of the First, Fourt, Fifth

and Fourteenth Amendments of the United States Constitution. The search warrant provisions of the statute T.C.A. 39-3106 authorize a general warrant permitting the seizure of one copy of whatever the District Attorney General or his disegnated representative decides is obscene without judicial sanction.

4. Whether the motion picture films are not obscene as a matter of law and protected under the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Tennessee Code Annotated 39-3010, 39-3013, 39-3016 and 39-3019 as well as the pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and Article II, Section 20 of the Tennessee Constitution are set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

The petitioner, Grady Taylor, was convicted in the Sullivan County, Tennessee Criminal Court for the offense of exhibiting obscene material at a motion picture theatre in Bristol, Tennessee, and received a jail sentence of six (6) months and a $3,-000.00 fine.

The State of Tennessee for a period of time had been without an obscenity statute since the previous

statute had been declared unconstitutional on February 9, 1974. The Legislature passed a new obscenity statute effective March 15, 1974, known as Chapter 510 of the Public Acts of 1974, now codified as T.C.A. 39-3010 through 39-3022. It was passed as an **emergency** act and effective immediately. If it had not been passed as an emergency. "the public welfare requiring it", it would have not been effective for forty (40) days under the Tennessee Constitution Article II, Section 20.

The new Tennessee obscenity statute provided for a civil proceeding to declare a film obscene, prohibit its further showing by injunction and to destroy the copy. The statute also provided for a criminal action for violation of the statute. The criminal action provisions were unique in that no criminal action shall be commenced except upon the application of the District Attorney General or his designated representative. Criminal action shall commence only upon issuance of a warrant by a judge of a court of record and no arrest warrant could issue againt a party unless twenty-four (24) hours' notice was given of the application for the warrant to allow the party to appear and contest the existence of probable cause.

The action against the petitioner began with a civil injunction petition filed on March 23, 1974, eight (8) days after the effective date of the act. It required the defendant to appeal on March 29, 1974, and bring with him the motion picture films and projection equipment so that the films could be

viewed by the court. The statute provided that the Circuit, Chancery or Criminal Courts had the power to issue such temporary restraining orders, temporary and permanent injunctions. If there was a final order or judgment of injunction, the motion picture would be surrendered to the Clerk of the Court to be held in his possession to be used as evidence in any **criminal proceeding** but if no indictment was returned within six (6) months to destroy the motion pictures.

The record indicates that a police officer and not the Attorney General made application for the warrant of arrest and notice was served upon the petitioner, Grady Taylor some time after the injunction proceedings had been completed. The injunction proceedings were completed in April. On May 2, 1974, a written notice was given to the petitioner by a police officer that an application for criminal warrant would be made on May 6, 1974. The Grand Jury thereafter returned an indictment on July 17, 1974. The petitioner appealed the civil proceedings to the Tennessee Supreme Court which heard the matter in the fall of 1974 but did not render an opinion until October 20, 1975.

In the meantime, in December, 1974 the petitioner was tried and convicted and sentenced as above. The State produced the motion pictures and identified them as being **seized** pursuant to the civil proceeding. The State further introduced proof that the petitioner was the manager or acting manager of the motion picture theatre as well as the projec-

tionist. No other testimony was introduced except the motion pictures.

The petitioner objected in the civil proceeding to producing the motion pictures relyng upon hs rights aganst self-incrimination. He further filed a Motion to Dismiss in the civil proceeding alleging that the statute was unconstitutional on federal grounds.

The petitioner further moved to suppress the evidence in the criminal proceeding and relied upon the evidence and proceedings in the civil injunction which were introduced and made a part of the record. He further had filed a Motion to Dismiss the indictment raising various constitutional grounds relying upon both the Tennessee and the United States Constitution. The Court overruled the Motion to Suppress and the Motion to Dismiss on the constitutional grounds.

The trial court and the Court of Criminal Appeals overruled the grounds that the arrest warrant was not requested pursuant to the statute by the District Attorney General or his designee.

The Tennessee Supreme Court in the civil injunction appeal had overruled the grounds of self-incrimination indicating that the petition was also against a corporation and Taylor was an employee or agent of the corporation and could not rely upon self-incrimination.

The Tennessee Supreme Court in the civil proceeding further upheld the constitutionality of the statute.

The Court of Criminal Appeals stated it was bound by the decision of the Tennessee Supreme Court in the civil proceeding and overruled all constitutional challenges and overruled the challenges to the procedures used by the police officer applying for the warrant.

The Tennessee Supreme Court refused to rule on questions involving a search warrant in the civil appeal and the Court of Criminal Appeals did not rule on the search warrant provisions when it was alleged by the petitioner that search warrant provisions of the statute were unconstitutional. It was contended that the civil procedures or equitable procedures could **not** be used **to circumvent** the search warrant procedures. Taylor contended that to use that evidence in the civil proceedings against him was error and that his Motion to Suppress should have been granted on this as well as on other grounds.

The Court of Criminal Appeals affirmed the conviction and the Tennessee Supreme Court denied certiorari on June 1, 1976 and this Petition for Certiorari resulted.

The petitioner, Grady Taylor, was the projectionist who became acting manager after the manager was terminated and was merely an employee of the theatre.

The motion pictures introduced in evidence contained nudity and simulated sexual activity. It was the contention of the petitioner that such simulated

activity was not "hard core" and that a matter of law the motion pictures were not obscene. The Appellate Court found otherwise.

REASONS FOR GRANTING THE WRIT

1. THE TENNESSEE STATUTE DEFINING THE CRIME OF OBSCENITY OMITS THE REQUIREMENT OF KNOWLEDGE FOR DISTRIBUTION WITHIN THE STATE AND IS CONTRARY TO THE RULINGS OF THE SUPREME COURT, PARTICULARLY **SMITH V. CALIFORNIA,** 361 U.S. 147.

Scienter is important in an obscenity statute in two aspects. The first and the one upon which the Tennessee statute is attacked, is that the statute itself in defining obscenity must require knowledge on the part of the defendant that the material is obscene. Otherwise, the statute imposes strict liability and is unconstitutional.

The second type of attack upon the statute is that "knowledge" or "knowingly" is improperly defined. This Court has now construed in **Hamling v. United States,** 418 U.S. 87, the type of knowledge that a defendant must have. It is not necessary that a defendant have knowledge of the legal status of the material as being obscene but this Court has determined it is constitutionally sufficient for the prosecution to show that the defendant had knowledge of the contents of the material he distributes and that he knew of the character and nature of the material.

The attack upon the Tennessee statute is that the Legislature, in drafting the law, did not insert "knowingly" as an element for exhibition of the material **within the State.** The Legislature made a mistake in drafting the statute and, of course, penal statutes are to be strictly construed.

In **Ellenburg v. State,** 215 Tenn. 153, 384 S.W. 2d 29, the Tennessee Supreme Court found the prior statute on **obscenity unconstitutional** because it did not contain the element of knowledge. The Court said that it would look to the legislative intent and stated:

> "In so doing we look to the statute itself, as affording the best means of its exposition, giving the language its usual and ordinary meaning without any force or subtle construction to extend their meaning. **Phillips and Buttorff Mfg. Co. v. Carson,** 188 Tenn. 132, 217 S.W. 2d 1 (1948); **State ex rel Dossett v. Obion County,** 188 Tenn. 538, S.W. 2d 705 (1949) **Moto-Pep, Inc. v. McGoldrick,** 202 Tenn. 119, 303 S.W. 2d 326 (1956)."

The Tennessee Supreme Court under the prior statute considered the three sections within that statute as follows:

> "Under the first part a person is guilty, if he print, publish, import, sell or distribute any of the named materals containing the prohibited obscenity. As an example, a person can be guilty, if he print a book, which contains prohibited obscene language. **This part does not, expressly or impliedly, require the printer, used in the example, have knowledge**

the book contained this prohibited obscene language.

"Under the second part a person is guilty if he introduces into any family, school or place of education any of the named materials containing the prohibited obscenity. As an example a person can be guilty if he introduce into a school pictures containing the prohibited obscenity. **This part does not, expressly or impliedly, require the person so introducing these pictures have knowledge they contain prohibited obscenity.**

"The third part of this statute deals with posession of the named materials containing the prohibited obscenity. Under this part a conviction can be had for possession, only if the State further show this possession was for the purpose of loan, sale, exhibitin or circulation, or with intent to introduce the same into any family, school or place of educaton. As an example a person can be guilty, if it be shown he had possession of a film containing prohibited obscenity and it being further shown he intended to introduce same into a family. **This part does not require, either expressly or impliedly, the person, used in the example, have knowledge this film contained prohibited obscenity."** (Emphasis Supplied) 384 S.W. 2d at 31

This Court in considering the constitutionality of **Miller v. California** 413 U.S. 15, had the Calfornia statute before it which reads as follows:

"S311.2 Sending or bringing into state for sale or

distribution; printing, exhibiting, distributing or possessing within state

"(a) Every person who **knowingly:** sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or **has** in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor . . . ." (Emphasis supplied) 93 Sup. Ct. at 2611

The California legislature was careful to provide that "knowingly" was applied to all clauses by stating "every person who knowingly: . . .".

The new obscenity law (T.C.A. 39-3013) is unconstitutional in that it does not provide for knowledge or scienter. The new Tennessee statute defines the crime of obscenity as follows:

"S39-3013 (a) It shall be unlawful
to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display,
or

in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute, any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates

in that part of such production which renders said production or performance obscene is guilty of said offense."

The statute cannot be read and make sense any other way. The first clause, although not involved in this case, refers to interstate transportation and is the only one in which "knowingly" appears.

The second clause (which is the one involved in this case) making it unlawful for the distribution or exhibition within the states **does not contain** anywhere in the clause or in the introductory portion which would be applicable, the **necessary element** of knowledge or scienter. This is included in the first section, but not in the second nor in the third. The Legislature must have deliberately left it out of the second, and it cannot be implied, particularly since the Legislature put it in the first clause. Since the element of knowledge is lacking, it is clear under **Smith v. Calfornia,** supra, that the section is unconstitutional.

Even more clearly, there is no provision for scienter in the third section relating to live performances. This is a completely separate sentence, and the deliberate or negligent omission of "knowingly" makes this section unconstitutional also.

It is, therefore, clear that the intention of the Legislature has been stated and that this definition is now not a constitutional definition of obscenity nor can this definition be authoritatively construed to save the statute.

As stated in **State v. Richmond,** 171 Tenn. 1, 100 S.W. 2d 1, nothing can be added to a statute. The Tennessee Supreme Court stated:

> " 'It has long been the well settled general rule that penal statutes are subject to the rule of strict construction. This will not be construed to include anything beyond their letter even though within their **spirit,** and nothing can be added to them by inference or intendment'. Such have been the uniform decisions of this state . . . (citations omitted). In **Burks v. State,** supra, it was said: 'penal statutes are to be construed strictly, and should be so definite as to give the citizen notice of the prohibitve act.' " (emphasis supplied) 100 S.W. 2d at pp. 2-3

The Tennessee Supreme Court construed the new obscenity statute in the civil proceeding in **Taylor v. State ex rel Kirkpatrick,** 529 S.W. 2d 692, and said it would be a strained construction to apply "knowingly" only to importation within the state and not to apply it to the remainder of the section. The Court said it refused to do violence to the Legislative intent and that the Legislature had before it the **Ellenburg v. State** case.

Of course, the Legislature had the Ellenburg case as well as the cases interpreting obscenity of this United States Supreme Court. That does not mean that the Legislature cannot make a mistake in draftmanship and it did. The penal statute must be strictly construed and as stated, it must not go beyond the letter even though the matter is within the spirit.

We respectfully submit that there is a conflict between the Tennessee statute which does not have "knowingly" as a requirement of this second clause and the decisions of this Court. The Court should grant certiorari and hold the statute unconstitutional.

2. THE TENNESSEE STATUTE PROVIDING FOR A CIVIL INJUNCTION PERMANENTLY ENJOINING FUTURE EXHIBITION AND ALSO SEIZURE FOR ANY SUBSEQUENT CRIMINAL CHARGE IS CONTRARY TO **PARIS ADULT THEATRE I v. SLATON**, 413 U.S. 49 **AND HELLER v. NEW YORK**, 413 U.S. 483.

Petitioner respectfully submits that a statute providing for a civil remedy to enjoin and prohibit future exhibitions must be construed to permit a criminal charge for an exhibition or distribution only when said exhibition is subsequent to the beginning of the civil sut requestng the injunction prohibiting exhibition.

The law is well settled that equity will take no part in the administration of criminal law. The use of the equitable remedy of the injunction to compel the seizure is contrary to this equitable axiom.

It is settled law that equity has no jurisdiction to restrain the commission of crimes or to enforce mere moral oblgations or performance of mere moral duties. Nor will equity interfere to prevent an illegal act merely because it is illegal. In all cases an injury to the legal or equitabe rights or property of the complainant must be involved.

The Tennessee statute (T.C.A. 39-3019) is a mixture of the civil remedy for an injunction and the use of said injunction as a tool for **seizure.**

The search warrant procedure (T.C.A. 39-3016) is unconstitutional as shown below and the Court should not allow to be done indirectly what cannot be done directly.

The statute on civil injunction provides that upon the issuance of a final order or judgment, the person is directed to surrender to the Clerk of the Court the obscene material in his possession and the Clerk is to hold it to be used as evidence in any criminal procedure in which such said materal is an issue. If there is no indictment within six (6) months, then the material is destroyed.

Section (c) of the same statute provides that the granting of an appeal shall stay the order to destroy but not an order "to seize such material."

It is clear that the civil injunction proceeding is not merely to enjoin future exhibition but is a matter of seizure for criminal prosecution.

Petitioner believes that this statute must be construed in the light of **Paris Adult Theatre I v. Slaton,** 413 U.S. 49, 93 Sup. Ct. 2628. In that case there was a Georgia civil procedure which the Court pointed out imposed no restraint until after a full adversary hearing. The Court further pointed out that the procedure would have even more merit if the exhibitor could also test the issue of obscenity prior to any exposure to criminal penalty. We believe that the Ten-

nessee statute providing for the civil injunction procedure is such that once the civil injunction is served upon an individual, the individual may take his chances and continue showing the film or may stop pending a determination by the Court in the civil injunction. If he stops, the statute must be interpreted in accordance with **Paris.** If there is no future showing of the film then there can be no criminal prosecution.

The State has the choice under the statute of seizing material under a search warrant and give notice of the application for an arrest warrant or to proceed civilly. In this cause there was no continued showing after the serving of the notice of the civil injunction. The application for the warrant was after the permanent injunction had been granted against the showing and the films seized.

This Court has distinguished between seizing a picture to hold as evidence in a criminal procedure and the final injunctive proceeding prohibiting exhibiting and destruction. In **Heller v. New York, supra,** this Court pointed out that the seizure of a motion picture film to preserve it as evidence in a criminal proceeding does not subject the film to any form of final restraint in the sense of being enjoined from exhibition or threatened with destruction. This, however, is what the Tennessee statute attempts to provide in the civil proceeding when it allows after notice a temporary injunction enjoining future showing and thereafter a permanent injunction with a

further seizure of the motion picture film to preserve it as evidence in a possible criminal proceeding.

Petitioner contends that the combining of the civil injunction remedy and the criminal process of seizure violates the principles of **Paris** and **Heller** and requires the Court to determine that the Tennessee statute is unconstitutional or unconstitutional as applied.

3. THE PETITION TO PRODUCE THE MOTION PICTURE BOTH TO ENJOIN AND TO SEIZE IS PART OF THE CRIMINAL SCHEME AND, IN REALITY, A SEARCH WARRANT. SAID SEARCH WARRANT PROVISIONS ARE UNCONSTITUTIONAL IN VIOLATIONS OF **HELLER v. NEW YORK,** 413 U.S. 483 AND **MARCUS v. SEARCH WARRANT,** 367 U.S. 717.

While a statute not unconstitutional on its face may be unconstitutionally enforced, a statute which is unconstitutional on its face cannot be constitutionally enforced. If the statute itself is **void** it must necessarily follow that all proceedings under the statute are also void, including the indictment, the conviction, and the sentence imposed by the Court.

It has been the settled law since **Quantity of Books v. Kansas,** 378 U.S. 205, and **Marcus v. Search Warrant,** 367 U.S. 771, 81 S. Ct. 1708, that a warrant giving the police or other person virtual unlimited authority to seize any publicatons whch they consder to be obscene were procedures constitutionally deficient for the lack of safeguards to prevent suppres-

sion of non-obscene publications protected by the Constitution. In **Quantity of Books v. Kansas** at page 1725, this Court stated:

> "In **Marcus,** the warrant gave the police virtually unlimited authority to seize any publications which they considered to be obscene . . . Even assuming that they were obscene, the procedures leading to their condemnation were constitutionally deficient for lack of safeguards to prevent suppression of non-obscene publications protected by the Constitution." 84 S. Ct. at 1725

The Tennessee statute on search warrants (T.C.A. 39-3016 (a))provides in part as follows:

> "Which warrant shall authorize or designate a law enforcement officer to enter upon the premises where alleged violations of the obscenity laws are being carried on and take into custody one (1) example of each piece of matter which is obscene in the opinion of the District Attorney General or his designated representative." (Emphasis supplied)
>
> T.C.A. 39-3016

The Tennessee statute, T.C.A. 39-3016, was improperly drafted, since the search warrant **must authorize** a law enforcement officer to seize one piece of each material which is obscene in the opinion of the **District Attorney General** or hs designated representative. **The search warrant** procedure is, therefore, unconstitutional and this conviction should be reversed.

4. THE MOTION PICTURES ARE NOT OBSCENE A SA MATTER OF LAW.

The Court in **Miller** has stated that no one will be subject to prosecution for the sale or exhibition of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct. The two motion pictures involved in this prosecution both have nudity but are simulated sexual conduct.

This Court has further stated in **Jenkins v. Georgia,** 418 U.S. 153, that questions of appeal to the prurient interest or patent offensiveness are questions of fact but juries do not have unbridled discretion in determining what is patently offensive. This Court has stated persons are protected because it is the ultimate of power of appellate courts to conduct an independent review of constitutional claims when necessary.

Petitioner does not claim that the motion pictures here are in the class of a motion picture such as "Carnal Knowledge." However, petitioner does contend that the motion pictures represent simulated sexual conduct and not "hard core" sexual conduct which the jury would find appeals to the prurient interest, that is, a shameful or morbid interest in sex as opposed to a normal interest in sexual activities of the average person applying contemporary community standards. This petitioner, who within a few days after the passage of a new statute, was brought into Court, for showing motion pictures of simulated sexual activity was not engaged in the showing a "hard core" pornography and the conviction should not stand.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted and the judgment of the lower court reversed, the statute held unconstitutional or in the alternative that the motion pictures be declared not obscene as a matter of law.

Frierson M. Graves, Jr.
Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify I have this day served upon opposing counsel the within and foregoing Petiton For Wrt Of Certiorari To The Court Of Criminal Appeals Of Tennessee by mailing three copies by United States mail, postage prepaid to William S. Koch, Assistant Attorney General, State of Tennessee, Supreme Court Building, Nashville, Tennessee, this — day of August, 1976.

Frierson M. Graves, Jr.
Attorney for Petitioner

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE KNOXVILLE, OCTOBER 1975 SESSION

GRADY TAYLOR

Plaintiff in Error

v.

STATE OF TENNESSEE

Defendant in Error

No. 254

Sullivan County

Honorable John K. Byers, Judge

(Exhibiting Obscene Material)

OPINION

The defendant, Grady Taylor, was convicted in the Sullivan County Criminal Court for the offense of exhibiting obscene material, and received a jail sentence of 6 months and a $3,000.00 fine.

The record shows that on March 23, 1974, the district attorney general filed a petition in the Sullivan County Criminal Court against the defendant and others, alleging that they were exhibiting two obscene motion picture films, one untitled and the other titled "Horney Hobo." After an adversary hearing, the trial judge ruled that the motion picture

films were obscene, and granted an injunction prohibiting their further exhibition. That case was appealed to the Supreme Court and the trial court's judgment was affirmed. **Taylor v. State ex rel. Kirkpatrick,** 529 S.W. 2d 692, 699 (Tenn. 1975).

The case now before us is the defendant's appeal from his criminal conviction for exhibiting the two moton picture flms heretofore mentioned.

In his first, fourth, and fifth assignments of error, the defendant alleges that by reason of the procedure used to obtain the evidence, he was compelled to give evidence against himself in violation of his constitutional rights, and that the Tennessee statutes on obscenity are unconstitutional for various enumerated reasons.

With respect to these assignments, we note that the same issues contained therein were presented to the Supreme Court in **Taylor v. State ex rel. Kirkpatrick, supra.** The Court ruled against the defendant's contentions regarding those issues and we are bound by that ruling; therefore, these assignments are overruled.

In his second assignment of error, the defendant argues that the arrest warrant was issued in this case without comlying with the provisions of T.C.A. S 39-3014, which section provides:

> "No criminal action to enforce the provisions of SS 39-3010 -- 39-3022 shall be commenced except upon application of the district attorney general or his designated representative. Said application

> shall be made only with the knowledge of and approval by the district attorney general. Criminal action shall commence only on issurance of a warrant by a judge of a court of record. No warrant shall issue until the party against whom a warrant is sought is notified of the application for a warrant and given twenty-four (24) hours to appear and contest the existence of probable cause for the issurance of a warrant. If the defendant fails to appear after notice, the hearing shall be held in his absence."

The record shows that on May 2, 1974, written notice was given to the defendant by a police officer that an application for a criminal warrant would be made on May 6, 1974. The warrant was issued on the latter date by the judge of the criminal court. Thereafter, the grand jury returned an indictment on July 17, 1974, charging the defendant with exhibiting and displaying obscene motion picture films.

In view of the petition filed by the attorney general on March 23, 1974, and the proceedings that had occurred incident thereto, together with the written notice given by the police officer, we do not see that the defendant was prejudiced by reason of this technical non-compliance with the statute, for it is obvious that he had adequate actual notice of the commencement of this criminal action. Furthermore, the fact the attorney general himself did not give the notice provided by T.C.A. S 39-3014, became inconsequential after the grand jury returned the indictment.

T.C.A. S 40-1605 provides that, "The grand jury shall have inquisitorial powers over all indictable or presentable offenses committed or triable within the county."

T.C.A. S 40-1606 provides that, The grand jury shall inquire into all indictable or presentable offenses committed or triable within the county, and present them to the court by indictment or presentment."

In our opinion, even if it is conceded that there was a technical non-compliance regarding the required statutory notice, it is immaterial in this case. The defendant's convicton depends not upon the valdity of the arrest warrant or proceedings incident thereto, but upon the indictment, and the grand jury having inquisitorial powers over this offense, the indictment was valid without regard to whether the defendant had received proper notice that an application would be made for the arrest warrant.

The provisions of T.C.A. S 39-3014 must not and cannot be interpreted so as to preclude a grand jury from investigating and returning indictments and presentmets for violations of the obscenity laws in the exercise of its inquisitoral powers over all indictable or presentable offenses committed within the county. T.C.A. SS 40-1605, 40-1606, 40-1609, 40-1617. Logic and the law say otherwise.

In **Jones v. State,** 206 Tenn. 245, 256-57, 332 S.W. 2d 662, 667 (1960), our Supreme Court, in holding that all questions about the sufficiency of a warrant

are foreclosed by the finding of all indictment, said:

> "Counsel has cited no authority and we think none will be found in this State holding that the validity of an indictment is to be tested and limited by what is found in the warrant. The purpose of a warrant is to give an accused person notice that he is charged with some offense and if the warrant is defective, objection may be raised before the committing magistrate or upon a habeas corpus proceeding before indictment. The correct rule is, however, that all questions as to the sufficiency of the warrant are foreclosed by the finding of an indictment, because under T.C.A. secs. 40-1605 to 40-1625 grand juries in this State are given inquisitorial powers over all indictable or presentable offenses committed or triable within the county. Consequently, it would be a miscarriage of justice to hold that when the probability of the commission of a crime has been called to the attention of the grand jury by either a defective or even a void warrant, the grand jury would be powerless to investigate the situation further and to find a valid indictment for whatever offense or offenses their investigation might develop."

In following the above rule in **Manier v. Henderson,** 1 Tenn. Cr. App. 341, 343, 442 S.W. 2d 281, 282 (1969), our Court said, "The manner of arrest is immaterial to the validity of the indictment."

In**Mullins v. State,** 214 Tenn. 366, 369-70, 380 S. W. 2d 201, 202 (1964), our Supreme Court said:

"This binding over does not have to be by warrant

or anything else as when the facts were properly presented to the Grand Jury an indictment might be found under these facts regardless of how the man was bound to the Grand Jury. Numerous cases are in the books and otherwise where defendants are prosecuted under indictments without being arrested prior to the return of the indictments; defendants are indicted after being released at a preliminary hearing; and in other cases defendants are prosecuted under indictments although the initial arrest was invalid."

The case of **French v. Shriver,** 225 Tenn. 727, 731, 476 S.W. 2d 636, 637-38 (1972), cited by the defendant in his brief, is not controlling here. That case dealt with the provisions of our former obscenity act, and involved the seizure of evidence contrary to the express provisions of that act. In that case the petitioners conceded that the obscenity statutes there involved did not "preclude the use of other legal methods of procedure for the prosecution of actions arising thereunder." They did insist,and the court agreed, that these statutes were "exclusive with respect to seizure and suppression of any obscene material." (emphasis added).

We would agree with the defendant's contention if the present appeal involved the unlawful seizure of the subject evidence. Our Court has recently held that where evidence is seized without following the procedural steps outlined in T.C.A. S 39-3014, then error is present and such evidence must be suppres-

sed. **Runions v. State,** Tenn. Cr. App., opinion released, Jackson, October, 1975.

We must point out, however, that the seizure of the evidence in the present case was not affected in any manner by the proceedings surrounding the issuance of the arrest warrant. Rather, the evidence in this case was lawfully seized by the district attorney general in accordance with the procedures set forth in T.C.A. S 39-3019, such seizure occurring prior to the issuance of the arrest warrant.

The indictment in this case is in all respect regular upon its face; it is sgned by the Dstrct Attorney General, Carl K. Krkjatrick, as the law requires; it contains sufficient allegations to charge the defendand with a violation of the obscenity laws; it lists the name of Edde L. Sims as the prosecutor; therefore, the indictment being valid, it can in no wise be affected by any of the proceedings, irregular or otherwise, that were attendant to the issurance of the notice for an application for an arrest warrant.

Thus, we overrule the defendant's second assignment of error.

In his third assignment of error, the defendant argues that the indictment was improper because Officer Eddie Sims was listed as the prosecutor. In making this assertion, the defendant does not point out why it was improper, other than stating that Sims obtained the arrest warrant in violation of the statute, which complaint we have already answered in this opinion. We find no impropriety in Sims be-

ing listed as the prosecutor on the indictment. We find no statutory mandate that requires the attorney general to be listed as the prosecutor on an indictment which charges a violation of the obscenity laws. This assignment is not meritorious.

In hs sixth assignment, the defendant argues that the motion picture films are not obscene as a matter of law. This same insistence about the same films was made before the Supreme Court in **Taylor v. State ex rel. Kirkpatrick, supra,** and there the Court found these films to be obscene.

In **Taylor,** the Court said:

"Lastly, appellants contend that the films here involved are not obscene. Having viewed these films, we have no hesitation in concluding that said films are grossly obscene. Indeed, they are 'hard core pornography.' The films are in the record and we do not deem it necessary to describe them in detail in this opinion. They clearly come withn the defnitions of obscene materials set out in Secton 2 of the Act. We hold (1) that the average person, applyng contemporary community standards, would find that each of these films, taken as a whole, appeals to the prurient interest; (2) that each film depicts or describes, in a patently offensive way, sexual conduct; and (3) that each film, taken as a whole, lacks serious literary, artistic, political or scientific value."

The Supreme Court having addressed this same question, we are bound by its ruling. Moreover, we have also viewed these films, and we find that they

are obscene within the purview of the difinition of that term as set forth in T.C.A. S 39-3010 (A). This assignment is overruled.

In his seventh assignment, the defendant complains that no evidence of contemporary community standards was introduced by the State by which the jury could judge the subject films, and in his eighth assignment, he argues that no expert testimony was introduced regarding the obscene character of the films.

The law does not require the State to introduce affirmative evidence to show such matters, other than to present the films themselves. **Hamling v. United States,** 418 U.S. 87, 94 S. Ct. 2887, 2901, 41 L. Ed. 2d 590 (1974); **Paris Adult Theatre 1 v. Slaton,** 413 U.S. 49, 56, 93 S. Ct. 2628, 2634, 37 L. Ed. 2d 446 (1973); **Kaplan v. California,** 413 U.S. 115, 121, 93 S. Ct. 2680, 2685, 37 L. Ed. 2d 492 (1973).

In **Hamling v. United States, supra,** the Court said:
"A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on hs knowledge of the propensities of a 'reasonable' person in other areas of the law."
In the **Paris Adult Theatre** case, the Court said:
"Nor was it error to fail to require 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. (citations omitted)
"The films, obviously, are the best evidence of

what they represent. 'In the cases in which this Court has decided obscenity questions since **Roth,** it has regarded the materials as sufficient in themselves for the determination of the question." **Ginzburg v. United States,** 383 U.S. 463, 465, 86 S. Ct. 942, 944, 1 L. Ed. 2d 31 (1966)."

In **Kaplan v. California, supra,** the Court, in commenting on its ruling in the Paris Adult Theatre case. said:

> "We also reject in **Paris Adult Theatre 1 v. Slaton,** 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446, any constitutional need for 'expert' testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence."

In the present case, the films themselves were the best evidence of whether they were obscne, and it was the jury's prerogative to apply its own knowledge in deciding whether the tests of obscenity, as set forth in the statute, had been met.

Thus, we overrule the defendant's seventh and eighth assignments of error.

In his final assignment of error, the defendant contends that the court's instructions did not give a correct definition of contemporary community standards by which the jury could judge the motion picture films.

At the trial the defendant made on objection to the court's charge and offered no special requests for instructions. As a general rule, where the court

has instructed generally as to the issues, no assignment of error on the judge's charge to the jury, either for omission or inadequacy, may be considered unless a special request was tendered, pointing out the defendant's contention as to the error. **Turner v. State,** 188 Tenn. 312, 219 S.W. 2d 188 (1949); **Cook v. State,** 506 S.W. 2d 955 (Tenn. Cr. App. 1973).

In the defendant's amendment to his motion for a new trial, he makes the broad allegation that "the court did err in charging the jury as to the law governing exhibiting obscene films," but he did not call to the tral judge's attention the specific complaint about the court's charge which he now raises.

In **Ezell v. State,** 220 Tenn. 11, 18, 413 S.W. 2d 678, 681 (1967), the rule was stated in this manner: "It has long been the rule of this Court that errors, to which no objections are made and exceptions taken in the court below, cannot be raised on appeal."

Our cases have consistently held that one may not raise questions for the first time in this Court. The trial judge will not be put in error upon matters not brought to his attention in a motion for a new trial. **Bolin v. State,** 4 Tenn. Cr. App. 387, 472 S.W. 2d 232 (1971); **Hancock v. State,** 1 Tenn. Cr. App. 116, 430 S.W. 2d 892 (1968); Rule 14 (5), Rules of the Supreme Court adopted by this Court.

Notwithstanding the foregoing, we have reviewed the court's charge and find that it properly charges the law in accordance with the provisions of T.C.A. S 39-3013, as well as charging the applicable defini-

tions contained in T.C.A. 3 39-3010. A sufficient definition of contemporary community standards was contained in the judge's charge. Further, the court's instructions meet the tests for obscenity as promulgated by **Miller v. California,** 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

We overrule the defendant's assignment complaining of the court's charge.

We find no reversible errors in this record. The judgment of the trial court is affirmed.

Joe D. Duncan, Judge

CONCUR:

Mark A. Walker, Judge

James C. Beasley, Special Judge

APPENDIX B

IN THE TENNESSEE COURT
OF CRIMINAL APPEALS AT KNOXVILLE

GRADY TAYLOR
Plaintiff in Error

vs

STATE OF TENNESSEE
Defendant in Error

No. 8149 BL

Sullivan County

No.: CCA-254

(Exhibiting Obscene)
Material

ORDER

Upon motion of the plaintiff in error, Grady Taylor, he is hereby granted a stay of execution of the judgment of this Court entered on March 1, 1976, for a period of ninety (90) days from June 1, 1976, pending the filing and disposition of a petiton for the writ of certiorari to the Supreme Court of the Unted States, his petition for certiorari to the Supreme Court of Tennessee having been denied on June 1, 1976.

During the ninety (90) days aforesaid, and pending disposition of his petiton for certiorari by the United States Supreme Court, the plaintiff in error may remain in liberty upon the execution and filing with the clerk of this Court an Appearance Bond to the United States Supreme Court in the language and form provided by the clerk of this Court for this purpose.

A copy of the petition for certiorari, certified by plaintiff in error's counsel and showing the date of its filing in the United States Supreme Court, will be promptly filed with the clerk of this Court.

At the conclusion of such ninety day period, if the plaintiff in error has failed to file his petition for the writ of certiorari in the United States Supreme Court, the Clerk will notify the Sheriff of Sullivan County to take him into custody and proceed to execute the judgment heretofore entered by this Court. The Clerk will give the said Sheriff like notice upon receipt of official notification from the United

States Supreme Court that the petition for the writ of certiorari of the plaintiff in error was denied.

The Clerk of this Court shall issue duly certified copies of this Order to the Clerk of the Criminal Court of Sullivan County and to the Sheriff of said County.

Enter this 3rd day of June, 1976.

(S) Joe D. Duncan
Judges Walker and
Beasley concur in this
order. J. D. D.

APPENDIX C

39-3010. Definitions for obscenity law — Definition of terms as used in SS 39-3010 — 39-3022 shall be as follows:

(A) "Obscene" means (1) that the average person applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) that the work depicts or describes, in a patently offensive way, sexual conduct; and (3) that the work, taken as a whole. lacks serious literary, artistic, political, or scientific value.

(B) "Prurent interest" means a shameful or morbid interest in sex.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture film,

or other pictorial representation, or any statue, figure, device, theatrical production or live performance, or any recording, transcription, or mechanical chemical or electrical reproduction, or any other article, equipment, machine or material that is obscene as defined by SS 39-3010 — 39-3022.

(D) "Person" as used in SS 39-3010 — 39-3022 shall include the singular and the plural and shall mean and include any individual, firm, partnership, copartnership, association, corporation, or other organization or other legal entity, or any agent of servant thereof.

(E) "Distribute" as used above means to transfer possession of, whether with or without consideration.

(F) "Knowingly" as used above means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(G) "Community" as used above means the state of Tennessee.

(H) "Sexual conduct" as used above shall be construed to mean: (1) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of ultimate sexual acts, anal, oral or genital. The term "ultimate sexual acts" shall be construed to mean sexual intercourse, anal

or otherwise, fellatio, cunnilingus or sodomy, or (2) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

(I) "Patently offensive" as used above means that which goes substantially beyond customary limits of candor in describing or representing such matters. (Acts 1974 (Adj. S.), ch 510, S 2.)

39-3013. Importing or preparing in state for sale, distribution, or exhibition — Distribution to or employment of minors — Penalties. — (A) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, on in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter. It shall be unlawful to direct present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

39-3016. Search warrant — Seized material retained by district attorney general — Hearing — (A) Upon a showing of probable cause that the obscenity laws of this state are being violated, any judge or magistrate shall be empowered to issue a search warrant in accordance with the general law pertaining to searches and seizures in this state which warrant shall authorize or designate a law

enforcement officer to enter upon the premises where alleged violations of the obscenity laws are being carried on and take into custody one (1) example of each piece of matter which is obscene in the opinion of the district attorney general or his designated representative. Return on the search shall be in the manner prescribed generally for searches and seizures in the state of Tennessee, except that matter that is seized shall be retained by the district attorney general to be used as evidence in any legal proceeding in which said matter is in issue or involved.

(B) When a search and seizure takes place in accordance with this section, any person aggrieved by said search and seizure or claiming ownership of the matter seized, may file a motion in writing with a court of record in the jurisdiction in which the search and seizure took place, contesting the legality of the search and seizure and/or the fact of the obscenity of the matter seized. Said court shall set a hearing within one (1) day after the request therefor, or at such times as the requesting party might agree. In the event the court finds that the search and seizure was illegal or if the court or any other court of competent jurisdiction shall determine that the matter is not obscene, said matter shall be forthwith returned to the person and to the place from which it was taken.

(C) Procedures under this section for the seizure of allegedly obscene matter shall be cumulative and in addition to all other lawful means of obtaining

evidence as provided by the laws of this state. Nothing contained in this section shall prevent the obtaining of allegedly obscene matter by purchase or under injunction proceedings as authorized by SS 39-3010 — 39-3022 or by any other statute of the state of Tennessee. (Acts 1974 (Adj. S.), ch 510, S 6.)

39-3019. Temporary restraining orders and injunctions — Trial — Judgment — Review. — (A) The circuit, chancery ,or criminal courts of this state and the chancellors and judges thereof shall have full power, authority, and jurisdiction, upon application by sworn detailed petition filed by the district attorney general within their respective jurisdictions, to issue any and all proper temporary restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of SS 39-3010 — 39-3022. However, this section shall not be construed to authorize the issuance of ex parte temporary injunctions preventing further regularly scheduled exhibition of motion picture films by commercial theatres, such injunction to issue only upon at least one (1) day's notce, but the court may immediately forbid the removing, destroying, deleting, splicing, amending or otherwise altering the matter alleged to be obscene. The person or persons to be enjoned shall be entitled to trial of the issues within two (2) days after joinder of issue and a decision shall be rendered by the court wthin two (2) days of the conclusion of the trial. In order to facilitate the introduction of evidence at any hearing as provided

heren, the court is hereby empowered to order defendants named in any proceeding set out herein to produce one (1) copy of the matter alleged to be obscene, along with necessary viewing equipment, in open court at the time of the hearing or at any other time agreed upon by the parties and the court. In proceedings under this section there shall be no right to trial by jury. If the defendant in any suit for injunction filed under the terms of this section shall fail to answer or otherwise join issue wthin twenty (20) days after the filing of a petition for injunction, the court, on motion of the district attorney general, shall enter a general denial for the defendant, and set a date for hearing on the questions raised in the petition for injunction within ten (10) days following the entry of the denial entered by the court and the court shall render its decision within two (2) days after the conclusion of that hearing.

(B) In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the clerk of the court of the county in which the proceedings were brought any of the obscene matter in his possession and such clerk shall be directed to hold said matter in his possession to be used as evidence in any criminal proceedings in which said matter is in issue but if no indictment is returned concerning said matter within six (6) months of the entry of said final order, the said clerk shall destroy said matter.

(C) The review of any final decree, order or judgment shall be by broad appeal direct to the Supreme Court. Any party, including the district attorney general, shall be entitled to an appeal from an adverse decision of the court. The granting of an appeal shall have the effect of staying or suspending any order to destroy but not an order to seize such matter, nor shall the granting of an appeal suspend any permanent injunction granted by the trial court. (Acts 1974 (Adj. S.), ch 510, S 9.)

ARTICLE 2

Sec. 20. Style of laws — Effective date — The style of the laws of this state shall be, "Be it enacted by the General Assembly of the State of Tennessee." No law of a general nature shall take effect until forty days after its passage unless the same or the caption thereof shall state that the public welfare requires that it should take effect sooner.

AMENDMENT 1

Religious and political freedom. — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT 4

Unreasonable searches and seizures — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants

shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

Criminal actions — Provisions concerning — Due process of law and just compensation clauses — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or n the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

S 1. Citizenship — Due process of law — Equal protection — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
FILED
OCT 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-293

GRADY TAYLOR,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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No. 76-293

GRADY TAYLOR,
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vs.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, State of Tennessee, respectfully submits that the Petition for Writ of Certiorari filed in this case should be denied.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court finding the motion pictures involved herein to be obscene is reported at 529 S.W.2d 692. The opinion of the Court of Criminal Appeals of Tennessee subsequently affirming the petitioner's conviction for exhibiting obscene materials dated March 1, 1976

is unreported but appears as Appendix A to the Petition for Writ of Certiorari. The Tennessee Supreme Court declined to review this case further on June 1, 1976 without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and T.C.A. §§ 39-3010 through 39-3022 as they existed at the time this offense was committed.[1] These statutes appear as "Appendix A" to this brief.

QUESTIONS PRESENTED

The petitioner presents four (4) questions to this Court for review:

[1] There have been four legislative changes and one major judicial change in Tennessee's obscenity statutes since this action was commenced. Chapter 205, Public Acts of 1975, now codified at T.C.A. §39-3023 concerns the exhibition of X-rated films at outdoor theatres. Chapter 306, Public Acts of 1975, repealed T.C.A. §39-3013(D)(3). Chapter 574, Public Acts of 1976, contained a minor amendment to T.C.A. §39-3014, and Chapter 635, Public Acts of 1976, amends T.C.A. §39-3014 to cover persons with no fixed place of business. It also provides that notices need not be given before search warrants are obtained and that the law contemplates the use of civil or criminal proceedings or both used either independently or simultaneously. On September 7, 1976, the Tennessee Supreme Court elided from T.C.A. §39-3016(A) the language "in the opinion of the district attorney general or his designated representative." *Anthony v. Carter*, Shelby Law (Tenn., filed Sept. 7, 1976) (For Publication). See Appendix B.

1. Whether the Tennessee statute (T.C.A. § 39-3013) defining the crime of distribution or exhibition of obscene material is unconstitutional because the statute omits any requirement of knowledge by the defendant for distribution or exhibition within the State of Tennessee.

2. Whether the Tennessee statute providing a civil remedy to enjoin and prohibit future exhibition of obscene material must be construed to permit a criminal charge only for an exhibition or distribution subsequent to the beginning of the civil suit requesting an injunction prohibiting exhibition.

3. Whether the injunction proceeding requiring a defendant to produce a motion picture or other material is part of the criminal scheme and, in reality, a search warrant so that there is an illegal search and seizure in that the statute is unconstitutional and void in violation of the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution. The search warrant provisions of the statute T.C.A. § 39-3106 authorize a general warrant permitting the seizure of one copy of whatever the District Attorney General or his designated representative decides is obscene without judicial sanction.

4. Whether the motion picture films are not obscene is a matter of law and protected under the First Amendment.

STATEMENT OF THE CASE

On March 23, 1974, the District Attorney General for Sullivan County, Tennessee filed a civil petition pursuant to T.C.A. § 39-3019 requesting that two motion pictures being publicly exhibited by the petitioner at the Graphic Arts Cinema in Bristol, Tennessee be declared obscene. The Court heard this matter and personally viewed the two films, one untitled and the other titled "Horny Hobo," on April 4, 1974. On May 31,

1974, the trial court entered an order finding the films to be obscene and permanently enjoining the petitioner from exhibiting these films. The petitioner duly perfected an appeal directly to the Tennessee Supreme Court pursuant to T.C.A. § 39-3019(C) alleging that T.C.A. §§ 39-3010 *et seq.* was unconstitutional on various grounds substantially similar to those raised in this petition. On October 20, 1975, the Tennessee Supreme Court affirmed the judgment of the trial court by finding that T.C.A. §§ 39-3010 *et seq.* were constitutional and that the films in question were obscene. *Taylor v. State ex rel. Kirkpatrick*, 529 S.W.2d 692 (Tenn. 1975).

On May 2, 1974, the Sullivan County District Attorney General notified the petitioner that the State intended to commence criminal proceedings against him. On May 6, 1974, the State obtained an arrest warrant basing its issuance on a detailed affidavit dated March 23, 1974, by a police officer who had personally viewed these two motion pictures on March 20, 1974. On May 21, 1974, the petitioner specifically waived a preliminary hearing.

The petitioner was subsequently indicted on July 17, 1974, by the Sullivan County Grand Jury at its July, 1974 term charging him with knowingly exhibiting and displaying obscene films in violation of T.C.A. §39-3013. On December 5, 1974, the petitioner entered a plea of not guilty to the charge of exhibiting obscene materials and the jury found him guilty of violating T.C.A. §39-3013 and fixed his punishment at six months in the county jail and imposed a three thousand dollar fine. The Tennessee Court of Criminal Appeals affirmed the petitioner's conviction on March 1, 1976, and on June 1, 1976, the Tennessee Supreme Court summarily denied the petitioner's petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I

T.C.A. §39-3013(A), Both on Its Face and as Construed by the Tennessee Supreme Court, Contains the Constitutionally Required Element of Scienter.

The petitioner first claims that T.C.A. §39-3013(A) is constitutionally defective because it does not require as an element of the crime of exhibiting obscene materials that the accused had knowledge of the character of the materials he was exhibiting. The full text of this section provides:

> "It shall be unlawful to knowingly send or cause to be sent, bring or cause to be brought, into this state, for sale, distribution, exhibition or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense."

The Tennessee Supreme Court found that the inclusion of the term "knowingly" defined T.C.A. §39-3010(F) rendered the statute constitutional in light of this Court's decisions in *Hamling v. United States*, 418 U.S. 87, 119-124, 94 S.Ct. 2887, 2909-2911 (1974) and *Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958 (1966). See also *Rosen v. United States*, 161 U.S. 29, 41, 16 S.Ct. 434, 438 (1896). The decision of the Tennessee Supreme Court in this case is certainly in accord with the applicable decisions of this Court. The petitioner obviously has no standing to challenge that portion of T.C.A. §39-3013(A) which deals with live theatrical productions because the facts show that he was not engaging in this activity.

II

The Use of a Combination of Civil and Criminal Remedies to Prevent the Exhibiting, Distribution or Sale of Obscene Materials Has Been Approved by This Court.

The petitioner next attacks T.C.A. § 39-3019 because it contains a procedure permitting the use of civil or criminal proceedings to prevent the exhibition, distribution or sale of obscene materials. He bases his constitutional attack on the belief that the institution of a civil proceeding prior to the commencement of a criminal prosecution results in an improper search and seizure. The petitioner has no standing to raise this Fourth Amendment claim because as the manager of a theatre operated by his corporate employer which was open to the public, he had no reasonable expectation of privacy concerning the films he was exhibiting.

Further, the procedure available to the State by virtue of T.C.A. §39-3019 is one that has been approved by this Court on repeated occasions. This Court has held:

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies is a matter within the legislature's range of choices."
>
> *Kingsley Books v. Brown*, 354 U.S. 436, 441, 77 S.Ct. 1325, 1328 (1957).

The mixture of civil and criminal remedies will pass constitutional muster as long as they do not impose an unconstitutional prior restraint on the freedom of speech. See generally *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 1247 (1975). In *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789 (1973) and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628 (1973), this Court approved state procedures whereby allegedly obscene materials were temporarily restrained for evidentiary purposes after a neutral magistrate, focusing searchingly on the question of obscenity, has found that there is probable cause to believe that the obscenity laws are being violated. See also *McKinney v. Alabama*, — U.S. —, 96 S.Ct. 1189 (1976).

The procedure used by the State in this case is the one contemplated by T.C.A. §39-3019 and does not unduly interfere with an individual's First Amendment rights. After the petitioner received notice that the State had commenced a proceeding against him, he was directed to produce the film in court for review by the trial judge. The trial judge took this action only after determining that there was probable cause to believe that T.C.A. §39-3013 was being violated. Prior to the hearing, the petitioner was free to exhibit the film but could not alter or destroy it or remove it from the jurisdiction of the trial court. After the court had viewed the film and determined it to be obscene, the film remained in the Court's custody, and the petitioner was enjoined from further exhibition of the film. At this point, the First Amendment protection presumptively surrounding the film vanished, but still, the petitioner had the right to avail himself of an expedited appeal to the Tennessee Supreme Court pursuant to T.C.A. §39-3019(C).

III

The Petitioner Has No Standing to Challenge the Validity of the Search Warrant Provisions of T.C.A. §39-3016(A).

The petitioner also seeks to challenge T.C.A. §39-3016(A) on the basis of the fact that it allows a District Attorney General or his representative to seize one example of each piece of ob-

scene material in the accused's possession after there has been a judicial determination that there is probable cause to believe that the accused is violating T.C.A. §39-3013. The Tennessee Supreme Court properly declined to pass upon this issue because the petitioner did not have standing to challenge the search warrant provisions, no search warrant having been used in this cause. *Taylor v. State ex rel. Kirkpatrick, supra,* 529 S.W.2d at 698-699. In any event, the question raised in this regard is now moot because the Tennessee Supreme Court has already found this provision to be unconstitutional and has elided the offending language from T.C.A. §39-3016(A). *Anthony v. Carter, supra* at n.1.

IV

The Two Films in This Case Are Clearly Obscene.

The petitioner finally contends that the two films involved in this case are not hard core pornography because they depict only simulated sexual conduct. This Court, however, has ruled that simulated sexual conduct can be obscene. *Miller v. California,* 413 U.S. 15, 25-26, 93 S.Ct. 2607, 2615-2616 (1973). The definition of "sexual conduct" appearing in T.C.A. §39-3010(H) closely parallels this Court's examples of permissible state statutory language. The sexual conduct in these films is far different from that discussed by this Court in *Jenkins v. Georgia,* 418 U.S. 153, 94 S.Ct. 2750 (1974), and thus the petitioner's argument in this regard is without merit.

CONCLUSION

The respondent respectfully submits that both the Tennessee Supreme Court and the Tennessee Court of Criminal Appeals have decided this case in accord with the applicable decisions of this Court, and therefore, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

39-3010. Definitions for obscenity law.—Definition of terms as used in §§ 39-3010-39-3022 shall be as follows:

(A) "Obscene" means (1) that the average person applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) that the work depicts or describes, in a patently offensive way, sexual conduct; and (3) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(B) "Prurient interest" means a shameful or morbid interest in sex.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture film, or other pictorial representation, or any statute, figure, device, theatrical production or live performance, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other article, equipment, machine or material that is obscene as defined by §§ 39-3010-39-3022.

(D) "Person" as used in §§ 39-3010-39-3022 shall include the singular and the plural and shall mean and include any individual, firm, partnership, copartnership, association, corporation, or other organization or other legal entity, or any agent or servant thereof.

(E) "Distribute" as used above means to transfer possession of, whether with or without consideration.

(F) "Knowingly" as used above means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(G) "Community" as used above means the state of Tennessee.

(H) "Sexual conduct" as used above shall be construed to mean: (1) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of ultimate sexual acts, anal, oral or genital. The term "ultimate sexual acts" shall be construed to mean sexual intercourse, anal or otherwise, fellatio, cunnilingus or sodomy, or (2) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.

(I) "Patently offensive" as used above means that which goes substantially beyond customary limits of candor in describing or representing such matters.

39-3011. Telephone conversation—Lewd, obscene or lascivious remarks—Harassing calls—Penalty.—It shall be unlawful for any person or persons to communicate to another or others within this state, by means of telephone conversation, any lewd, obscene or lascivious remark, suggestion or proposal manifestly intended to embarrass, disturb or annoy the person to whom the said remark, suggestion or proposal is made. It shall also be unlawful for any person or persons to make use of telephone facilities or equipment (1) for an anonymous call or calls, whether or not a conversation ensues, if made or communicated in a manner reasonably to be expected to annoy, abuse, torment, threaten, harass or embarass one or more persons, or (2) for repeated calls, if such calls are not for a lawful purpose, but are made with intent to abuse, torment, threaten, harass or embarass one or more persons.

Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof

be fined not more than one thousand dollars ($1,000) and in the discretion of the court shall be confined in the county jail or workhouse for some period of time less than one (1) year.

39-3012. Businesses dealing in obscene material—Public policy—Libraries excluded.—The conducting of the business of selling, displaying, exhibiting or distributing obscene material as defined in §§ 39-3010-39-3022 and/or engaging in the business of operating an adult peep show house is hereby declared to be against public policy. Sections 39-3010-39-3022 shall not, however, be applicable to a "library" as defined in § 69-202.

39.3013. Importing or preparing in state for sale, distribution, or exhibition—Distribution to or employment of minors—Penalties.—(A) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

(B) Notwithstanding any of the provisions of §§ 39-3010—39-3022, the distribution of obscene matter to minors shall be governed by § 39-1012 et seq. In case of any conflict between the provisions of §§ 39-3010—39-3022 and § 39-1012 et seq., the provisions of the latter shall prevail as to minors.

(C) It shall be unlawful to hire, employ, or use a minor to do or assist in doing any of the acts described in subsection (A) with knowledge that a person is a minor under eighteen (18) years of age, or while in possession of such facts that he or she should

reasonably know that such person is a minor under eighteen (18) years of age.

(D) (1) Every person who violates subsection (A) is punishable by a fine of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000), or by confinement in the county jail or workhouse for not more than one (1) year, or by both fine and confinement. If such person has previously been convicted of a violation of §§ 39-3010—39-3022, a violation of subsection (A) is punishable as a felony by a fine of not less than five hundred dollars ($500) nor more than ten thousand dollars ($10,000), or by imprisonment in the state penitentiary for a term of not less than two (2) nor more than five (5) years or by both fine and imprisonment.

(2) Every person who violates subsection (C) is punishable by a fine of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000) or by confinement in the county jail or workhouse for not more than one (1) year, or by both fine and confinement. If such person has been previously convicted of a violation of §§ 39-3010—39-3022, a violation of subsection (C) is punishable as a felony and by a fine of not less than five hundred dollars ($500) nor more than ten thousand dollars ($10,000) or by imprisonment in the state penitentiary for a term of not less than two (2) years nor more than five (5) years.

(3) Every person who violates subsection (D) is punishable by a fine of not less than five hundred dollars ($500) nor more than ten thousand dollars ($10,000), or by imprisonment in the state penitentiary for a term of not less than one (1) year nor more than five years, or by both such fine and imprisonment.

39-3014. Enforcement initiated by district attorney general—Warrant—Notice.—No criminal action to enforce the provisions of §§ 39-3010—39-3022 shall be commenced except upon application of the district attorney general or his designated repre-

sentative. Said application shall be made only with the knowledge of and approval by the district attorney general. Criminal action shall commence only on issuance of a warrant by a judge of a court of record. No warrant shall issue until the party against whom a warrant is sought is notified of the application for a warrant and given twenty-four (24) hours to appear and contest the existence of probable cause for the issuance of a warrant. If the defendant fails to appear after notice, the hearing shall be held in his absence.

39-3015. Contract to accept or distribute obscene material not a defense—Contract unenforceable.—Any contract to be performed in whole or in part in this state which requires any person, firm, or corporation to accept, receive, sell distribute, or purchase any material which is obscene, as defined in § 39-3010, whether as a condition precedent to other contractual arrangements or otherwise, shall be no defense to any criminal, civil, or injunction suit; and such a contract, to the extent that it may require any person, firm, or corporation to accept, receive, sell, distribute, or purchase any material which is obscene, is hereby declared to be against public policy and unenforceable.

39-3016. Search warrant—Seized material retained by district attorney general—Hearing.—(A) Upon a showing of probable cause that the obscenity laws of this state are being violated, any judge or magistrate shall be empowered to issue a search warrant in accordance with the general law pertaining to searches and seizures in this state which warrant shall authorize or designate a law enforcement officer to enter upon the premises where alleged violations of the obscenity laws are being carried on and take into custody one (1) example of each piece of matter which is obscene in the opinion of the district attorney general or his designated representative. Return on the search shall be in the manner prescribed generally for searches and seizures in the state of Tennessee, except that mat-

ter that is seized shall be retained by the district attorney general to be used as evidence in any legal proceeding in which said matter is in issue or involved.

(B) When a search and seizure takes place in accordance with this section, any person aggrieved by said search and seizure or claiming ownership of the matter seized, may file a motion in writing with a court of record in the jurisdiction in which the search and seizure took place, contesting the legality of the search and seizure and/or the fact of the obscenity of the matter seized. Said court shall set a hearing within one (1) day after the request therefor, or at such time as the requesting party might agree. In the event the court finds that the search and seizure was illegal or if the court or any other court of competent jursidiction shall determine that the matter is not obscene, said matter shall be forthwith returned to the person and to the place from which it was taken.

(C) Procedures under this section for the seizure of allegedly obscene matter shall be cumulative and in addition to all other lawful means of obtaining evidence as provided by the laws of this state. Nothing contained in this section shall prevent the obtaining of allegedly obscene matter by purchase or under injunction proceedings as authorized by §§ 39-3010—39-3022 or by any other statute of the state of Tennessee.

39-3017. Destruction of obscene material upon conviction. —Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney general or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

39-3018. Noncitizens and those not present in state subject to penalties.—Every person, whether or not he is a citizen of

or present in this state, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this state, or who knowingly sends or causes to be sent into this state for sale or distribution any obscene matter or any advertising promoting the sale or distribution of obscene matter, shall be subject to the penalties of §§ 39-3010—39-3022, and the executive authority of this state shall demand extradition of such person from the executive authority of the state or foreign country in which such person is found.

39-3019. Temporary restraining orders and injunctions—Trial—Judgment—Review.—(A) The circuit, chancery, or criminal courts of this state and the chancellors and judges thereof shall have full power, authority, and jurisdiction, upon application by sworn detailed petition filed by the district attorney general within their respective jurisdictions, to issue any and all proper temporary restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of §§ 39-3010-39-3022. However, this section shall not be construed to authorize the issuance of ex parte temporary injunctions preventing further regularly scheduled exhibition of motion picture films by commercial theaters, such injunction to issue only upon at least one (1) day's notice, but the court may immediately forbid the removing, destroying, deleting, splicing, amending or otherwise altering the matter alleged to be obscene. The person or persons to be enjoined shall be entitled to trial of the issues within two (2) days after joinder of issue and a decision shall be rendered by the court within two (2) days of the conclusion of the trial. In order to facilitate the introduction of evidence at any hearing as provided herein, the court is hereby empowered to order defendants named in any proceeding set out herein to produce one (1) copy of the matter alleged to be obscene, along with necessary viewing equipment, in open court at the time of the hearing or at any time agreed upon by the

parties and the court. In proceedings under this section there shall be no right to trial by jury. If the defendant in any suit for injunction filed under the terms of this section shall fail to answer or otherwise join issue within twenty (20) days after the filing of a petition for injunction, the court, on motion of the district attorney general, shall enter a general denial for the defendant, and set a date for hearing on the questions raised in the petition for injunction within ten (10) days following the entry of the denial entered by the court and the court shall render its decision within two (2) days after the conclusion of that hearing.

(B) In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the clerk of the court of the county in which the proceedings were brought any of the obscene matter in his possession and such clerk shall be directed to hold said matter in his possession to be used as evidence in any criminal proceedings in which said matter is in issue but if no indictment is returned concerning said matter within six (6) months of the entry of said final order, the said clerk shall destroy said matter.

(C) The review of any final decree, order or judgment shall be by broad appeal direct to the Supreme Court. Any party, including the district attorney general, shall be entitled to an appeal from an adverse decision of the court. The granting of an appeal shall have the effect of staying or suspending any order to destroy but not an order to seize such matter, nor shall the granting of an appeal suspend any permanent injunction granted by the trial court.

39-3020. Bond not required of prosecution.—Neither the state nor the district attorney general shall be required to file any injunction, cost or appeal bond or to pay any costs or service or process fees in actions filed under §§ 39-3010-39-3022.

39-3021. Conflict with rules of civil procedure.—The provisions of §§ 39-3010-39-3022 shall take precedence over the Tennessee Rules of Civil Procedure when there is any conflict between said rules and the provisions of §§ 39-3010-39-3022.

39-3022. Remedies supplementary.—The remedies and procedures set out in §§ 39-3010-39-3022 are supplementary to each other and no remedy shall be construed as excluding or prohibiting the use of any other remedy.

Except as expressly herein provided, the provisions of §§ 39-3010-39-3022 shall not be construed as repealing any provisions of any other statute, but shall be supplementary thereto and cumulative thereto.

APPENDIX B

September 7, 1976
For Publication

In the Supreme Court of Tennessee
at Nashville

Larry D. Anthony, William E. Frulla, Assistant District Attorney, and Hugh Stanton, Jr., District Attorney General,

Appellants,

v.

Carl R. Carter and William V. Mallozzi,

Appellees.

Shelby Law
Honorable
John R. McCarroll, Jr.,
Judge

For Appellants:

William C. Koch, Jr.
Assistant Attorney General
Nashville, Tennessee

Of Counsel:

R. A. Ashley, Jr.
Attorney General
Nashville, Tennessee

For Appellees:

Frierson M. Graves, Jr.
Memphis, Tennessee

Michael F. Pleasants
Memphis, Tennessee

Of Counsel:

Heiskell, Donelson, Adams, Williams & Kirsch
Memphis, Tennessee

Opinion

Affirmed

Brock, J.

This is a direct appeal from a decision of the Circuit Court for Shelby County, Division II, holding that portions of the

Tennessee Obscenity Act, T.C.A. §§ 39-3010 et seq., relating to search and seizure are unconstitutional and that the search warrants employed in this case were general warrants prohibited by the Fourth Amendment to the U.S. Constitution. We affirm the judgment of the Circuit Court.

The appellees in this case are connected with a commercial operation which distributes magazines and movie films which the State contends are legally obscene. On April 1, 1975, the Criminal Court of Shelby County issued two search warrants authorizing the search of premises at two locations and certain automobiles in which the alleged obscene material was being stored or from which it was being distributed. The record contains copies of an "Affidavit for Probable Cause," signed by appellant Larry D. Anthony, in which the affiant summarizes information received from an informant who was formerly employed by appellees. This information generally describes the materials in the buildings as magazines and films "depicting sexual conduct and ultimate sexual acts." It also describes the method of distribution used by the appellees and describes an eyewitness account of the filming of an obscene motion picture in Memphis.

The warrants were executed on April 1, 1975. They authorized law enforcement personnel to search the premises and seize the following property:

> "books and records of Carl R. Carter pertaining to interstate and intrastate shipments of adult films; 8 mm and 16 mm adult films depicting sexual activity; and magazines depicting sexual activity in violation of Tennessee Code Annotated, Sections 39-3010, *et seq.*"

The statutory authority for such a warrant is T.C.A. § 39-3016 which purports to authorize law enforcement officers to "take into custody one (1) example of each piece of matter which is obscene in the opinion of the district attorney-general or his

designated representative." T.C.A. § 39-3016(A).[1] It is this portion of the obscenity statute which the court below held to be unconstitutional.

Upon execution of the warrants, the officers seized "about 40 or 50 movie films and a large quantity of business records pertaining to shipment of the films by appellees to "adult" theaters. The contention of the State that the two locations contained a total of about 300 films is apparently uncontested by appellees. There is no evidence in the record whether or not any of the remaining films were duplicates of each other or duplicates of those seized. The seizure also included two 16 mm movie projectors and a briefcase which, among other things, contained the personal checkbook of one of the appellees.

On April 14, 1975, the appellees filed a motion in the Circuit Court seeking a return of the items seized, as authorized by T.C.A. § 39-3016(B). On April 21, 1975, the court ordered the immediate return of the two projectors and the briefcase and checkbook; all other materials remained in the State's custody.

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[1] "39-3016. Search warrant—Seized material retained by district attorney general—Hearing.—(A) Upon a showing of probable cause that the obscenity laws of this state are being violated, any judge or magistrate shall be empowered to issue a search warrant in accordance with the general law pertaining to searches and seizures in this state which warrant shall authorize or designate a law enforcement officer to enter upon the premises where alleged violations of the obscenity laws are being carried on and take into custody one (1) example of each piece of matter which is obscene in the opinion of the district attorney general or his designated representative. Return on the search shall be in the manner prescribed generally for searches and seizures in the state of Tennessee, except that matter that is seized shall be retained by the district attorney general to be used as evidence in any legal proceeding in which said matter is in issue or involved.

"(B) When a search and seizure takes place in accordance with this section, any person aggrieved by said search and seizure or claiming ownership of the matter seized, may file a motion in writing with a court of record in the jurisdiction in which the search and seizure took place, contesting the legality of the search and seizure and/or the fact of the obscenity of the matter seized. Said court shall set a hearing within one (1) day after the request therefor, or at such time as the requesting party might agree. In the event the court finds that the search and seizure was illegal or if the court or any other court of competent jurisdiction shall determine that the matter is not obscene, said matter shall be forthwith returned to the person and to the place from which it was taken."

The court then held a hearing on the motion and determined that (1) the search warrants were constitutionally invalid "general warrants" and that (2) the above-mentioned portion of 39-3016(A), which allows the district attorney general or his representative "the power to make an on-the-spot determination whether or not material is obscene", and, therefore, subject to seizure, was unconstitutional. The court then ordered the return of all items seized in the April 1 action.

On July 8, 1975, upon appellants' motion, Mr. Chief Justice Fones issued a writ of supersedeas to stay the Circuit Court's order pending outcome of this appeal. The seized materials thus remain in the custody of the district attorney general.

The Circuit Court, in holding the above quoted portion of 39-3016(A) to be unconstitutional, relied upon *Marcus v. Search Warrant*, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961) and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964).

The *Marcus* case involved a wholesale distributor of allegedly pornographic books and magazines. A police lieutenant visited the defendant as part of a vice squad investigation and determined that he distributed certain specified publications. Upon this information, a warrant was issued authorizing officers to seize obscene materials. A search and seizure followed that netted 11,000 copies of 280 publications, only 100 of which were later found to be legally obscene. The Supreme Court held this action to be unconstitutional, saying:

". . . the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene. The warrants gave the broadest discretion to the executing officers; *they* merely repeated the language of the statute and the complaints, *specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene * * * publications.'*

* * * * * * *

"They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." 81 S. Ct. at 1716." (Emphasis added.)

The *Marcus* decision was followed in *A Quantity of Copies of Books v. Kansas*, which also involved a "massive" seizure of publications designed to permanently restrain their distribution. See also *Lee Art Theatre v. Virginia*, 392 U.S. 636, 88 S. Ct. 2103, 20 L. Ed. 2d 1313 (1968).

It is too well settled to require citation of authority that the Fourth Amendment requires that an impartial magistrate, rather than the prosecutor or a police officer, make the determination, not only whether or not a warrant shall issue, but also the specification of the articles to be seized and the place to be searched. Clearly, then, T.C.A. § 39-3016(A), insofar as it purports to authorize police officers to seize such articles as are obscene in the opinion of the attorney general or his designated representative violates the Fourth Amendment and is void.

Likewise, the warrants in this case in describing the articles to be seized use language markedly lacking in the specificity

required by the Fourth Amendment mandate that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Since the Supreme Court's 1965 decision in *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431, it is clear that more specificity is required when the object of the seizure involves the First Amendment. As the Court said in *Stanford*:

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. (Citing *Marcus v. Search Warrant, supra*, and *A Quantity of Copies of Books v. Kansas, supra*.) No less a standard could be faithful to First Amendment freedoms.
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> * * * * * * *
>
> " 'The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " 85 S. Ct. at 511-512.

We, therefore, hold that the warrants in this case were unconstitutional general warrants and that the portion of T.C.A. 39-3016(A) reading "in the opinion of the district attorney general or his designated representative" is unconstitutional under the authorities previously cited. Furthermore, the statute, the warrants and the seizures also violate Article 1, Sec. 7, Constitution of Tennessee, in the same particulars as above

discussed with reference to the Fourth Amendment.[1] However, we think the doctrine of elision can be applied in this instance to strike only the phrase quoted above in order to preserve the continuity of the statute and spare it from constitutional infirmity. See *Armistead v. Karsch*, 192 Tenn. 137, 237 S.W.2d 960 (1951). Both parties agree in their briefs to the elision. The judgment of the Circuit Court is affirmed. Appellants will pay the costs on appeal.

/s/ Ray Brock, J.

Concur:

Cooper, C.J.
Fones, J.
Henry, J.
Harbison, J.

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[1] Article 1, Sec. 7, Constitution of Tennessee, provides:

"That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted."